



Johnson, Catherine (2009) Trading Auntie: the exploitation and protection of intellectual property rights during the BBC's monopoly years. *New Review of Film and Television Studies*, 7 (4). pp. 441-458. ISSN 1740-0309

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This is an Accepted Manuscript of an article published by Taylor & Francis Group in *New Review of Film and Television Studies* on 1 December 2009, available online at: <http://www.tandfonline.com/10.1080/17400300903307019>

**Trading Auntie: the exploitation and protection of intellectual property rights during the
BBC's monopoly years**

Catherine Johnson

Abstract:

Most histories of British television date the emergence of a trade in programming to the mid- to late-1950s when recording technologies turned previously ephemeral programmes into exchangeable goods and ITV brought a commercial impetus to British broadcasting. However, this historicisation of British broadcasting fails to acknowledge that the BBC was engaged in selling the rights to its programming before the arrival of commercial television in 1955. By exploring the sale of rights to two key programmes in the period between 1946 and 1955 (the radio serial *Dick Barton* and the television serial *The Quatermass Experiment*) this article demonstrates the ways in which the BBC operated within a broader set of commercial industries and engaged in commercial practices even while it had a public service monopoly on broadcasting. However, this article argues that the BBC's trade in rights was not primarily motivated by financial gain, but rather by the corporation's need to

protect the integrity of its programming and its corporate identity. While contemporary accounts of the trade in intellectual property equate it with an increased commercialisation in British broadcasting, this history points to the importance of propriety in understanding the function of the trade in intellectual property historically and today.

Introduction:

In most histories of British television, the trade in programming (when it is discussed at all) is seen to be tied to two developments: the emergence of recording technologies and the arrival of commercial television. For example, John Caughie argues that ‘the arrival of the entrepreneurial independent television companies marked a new interest in the international trade in programmes’ (2000, 53) and that, ‘The shift from direct transmission to recording turned television from use value to exchange value, re-forming even public service television as not only a cultural good but also a tradeable good’ (2000, 54).ⁱ Such historicisations preserve an understanding of the period in the UK before the arrival of commercial television in 1955, and before the common use of recording technologies in the late-1950s and 1960s, as a period in which the BBC’s public service monopoly protected television (and broadcasting more generally) from the demands of commerce and the marketplace. Asa Briggs, in his official history of the BBC, does acknowledge that there were some at the BBC keen to exploit the potential of a trade in television during the BBC’s monopoly years:

Before commercial television interests suggested that Britain should and could become the Hollywood of the international television industry, there had been

several people inside the BBC who had seen the possibilities without being able to exploit them. Collins [Norman Collins, Controller of Television] had referred to the possibility of exports as early as September 1948 (1979, 979)

Despite this, Briggs also locates the emergence of a trade in television at the BBC to the mid-1950s, citing the development of the Overseas Film Unit in 1956 which supplied telerecordings and films to the US and Europe, and (as the quotation above indicates) seeing the emergence of commercial television as the catalyst for the development of trade in television programmes in the UK.ⁱⁱ

These historical accounts belie the extent to which the BBC engaged in commercial practices during the years when it had a public service monopoly on broadcasting and, as Johnson and Turnock (2005) have argued in relation to the history of ITV, create a false dichotomy between public service and commercial values. While the arrival of ITV and of recording technologies certainly enhanced the trade in television programmes as physical objects, the BBC had a history of trading the rights to its programming material (both radio and television) that can be traced well before the mid-1950s. The tendency to equate histories of trade in television with both physical programmes and international exports has meant that the trade in rights (for example the sale of rights for film, play or book adaptations of television and radio programmes) has been neglected in histories of British broadcasting. Yet in the past two decades, the rights trade has become an increasingly important aspect of television production, whether in the growth in the sale of formats for primetime (Steemers 2004, 173-80) or in the importance of ancillary markets (Steemers 2004, 135-6; Johnson 2007). Increasingly the products of the broadcasting industries have been recast as what Coombe and Herman describe as 'corporately controlled commodity-

signs ... that circulate as part of our public culture but are also private properties, protected by laws of intellectual property' (2001, 920). At the same time intellectual property law has extended proprietary rights, potentially constraining cultural expression while creating new realms of economic value for the cultural industries as 'the competition between goods and services has come to reside more and more in what is called their publicity value, reputation or brand image' (Lury 2004, 109).ⁱⁱⁱ

This explosion in the trade in rights is frequently attributed to the expansion, marketisation and deregulation of the television industries across the West with the emergence of new satellite and cable commercial channels leading broadcasters to seek new forms of revenue and cheaper and less risky forms of programme production, as well as creating new markets for the sale of formats themselves (Steemers 2004, 24-7). While these changes clearly had an impact on Western television industries, to understand fully the significance of these new commercial activities, and the apparent newness of these developments within television, we need to have a much clearer understanding of the historical dimensions of this trade. This means recognising, as Geoffrey Nowell-Smith argues, that the trade in intellectual property rights has a history:

Increasingly the trade is not in physical goods – long-playing records, cans of celluloid – but in immaterials. ... This dematerialisation of the trade in culture-goods has focused attention on the fact that it is actually, and to a great extent always has been, a trade in property rights, in what is now called intellectual property or IP (2006, 14)

Opening up the hidden history of the role of rights in British broadcasting is complicated by the vagaries of intellectual property law. Before the Copyright Act of 1956

there was no legal protection for radio and television broadcasts, only for the scripts upon which they were based. And as we shall go on to see, it was often the writers/performers (and not the BBC) who owned the copyright to the scripts for BBC programmes. Within the BBC there was a certain amount of conflict about the extent to which the corporation should be concerned with owning and with selling the rights to its programming material. Yet at the same time, research at the BBC Written Archive Centre (WAC) has indicated that from the late 1930s the BBC became increasingly interested in retaining and selling the rights to its scripts, as it did with the radio variety programmes *Band Wagon* (BBC, 1938-9) and *It's that Man Again* (BBC, 1939-49). While there is certainly much scope for tracing this earlier history of the BBC's trade in rights, in this article I want to focus on two BBC dramas from the post-war period: the radio serial *Dick Barton Special Agent* (1946-51), and the television serial *The Quatermass Experiment* (1953). There are a number of reasons for beginning to explore the BBC's sale of rights with these programmes. First, both programmes were adapted into films by the same company, Exclusive Films (and its production arm, Hammer Film Productions). Exclusive adopted a specific strategy of adapting BBC radio material for the cinema over the second half of the 1940s. *Dick Barton* was the first radio serial adapted for cinema exhibition by Exclusive as part of this strategy, while *The Quatermass Experiment* was the last BBC programme adapted by Exclusive before the arrival of commercial television. Second, the post-war period is one in which television became more important for the BBC, and both examples reveal the extent to which rights were an important way for the BBC to police the relationships between film, radio and television. This is apparent, as I shall go on to argue, in the importance that the BBC placed on being able to televise the film adaptations of its radio serial *Dick Barton*. Third, these two examples demonstrate the extent to which negotiations over rights differed (or not) for

radio and television serials, and the extent to which practices from radio were adopted or adapted for television. Finally, the BBC WAC files on the legal exploitation of *Dick Barton* also reveal how the negotiation of rights extended beyond film rights to include books, toys and ancillary merchandise, areas which the BBC found particularly problematic.

In some ways, these two examples are exceptional, rather than representative, of the rights trade around broadcasting at this time. Between 1948 and 1954 Exclusive/Hammer adapted 15 radio programmes for cinema. Yet the BBC Written Archive Centre only holds contracts for the film adaptations of *Dick Barton* and *The Quatermass Experiment*, because the copyright for the other radio programmes was not held by the BBC. In this period, therefore, it was more common for the rights to radio and television programmes to be retained and sold by the writer, rather than the BBC. However, these two case studies are representative of the BBC's increased concern and engagement with the sale of rights at this time. They draw on (and sometimes initiate) policy shifts within the BBC about the corporation's handling of the trade in rights and so illustrate the broader contexts for and debates surrounding the sale of rights at the BBC. Furthermore, many of the larger issues raised by these case studies (such as the conflict between exploitation and protection) are apparent in other examples of the BBC's sale of rights, such as *Band Wagon* and *It's That Man Again*.

While this article can only explore a few examples from the BBC's monopoly years, these reveal that the trade in rights was not unusual at this time, and point to the complex ways in which the BBC functioned within a broader set of commercial cultural industries before the arrival of commercial television. For the BBC this was not always an easy position to negotiate, and as the following examples will demonstrate, there was uncertainty within

the corporation about the place and role of what were often seen as commercial activities. However, despite this the BBC continued to engage in the sale of rights. The reason for this, as I will go on to argue, is because the rights trade functioned as an important site through which the BBC could protect its reputation in various ways. Therefore, while contemporary scholars have seen the rise in the rights trade in broadcasting over the past 20 years as part of an increased commercialisation and marketisation in British broadcasting, this article suggests that we must be wary of equating the trade in rights solely with commercial exploitation. In doing so this article points to the important role that intellectual property plays in attempting to control public meanings and uses of the media. In using the trade in rights to protect its reputation the BBC was attempting to control the public meanings associated with its programming and with itself as a corporation. As a consequence, the conflicts over the trade in rights for *Dick Barton* and *The Quatermass Experiment* foreshadow the current debates about the social role of intellectual property law in the construction of public meaning through, and about, the media, and point to the importance of historicising our understanding of the current role of rights in broadcasting, even if the case studies presented here only touch the surface of a much wider history that demands exploration.

Trading Film Rights:

Traditionally, histories of British cinema and television characterise the immediate post-war era as one in which the relationship between the BBC and the film industry was hostile and antagonistic. The film industry (so these accounts go) was threatened by the potential for television to take audiences away from cinema. Buscombe argues that in the

1930s and 1940s there was a de facto ban by the film industry on selling the BBC rights to televise cinema films (1991, 198-9). As we shall go on to see, this hostility between the film and television industries caused problems for the sales of rights to adapt BBC material into film. Yet at the same time, the history of the trade in rights reveals a much more symbiotic relationship between the film industry and the BBC than that painted by Buscombe.^{iv} There is clear evidence of a trade in rights between the BBC and the film industry from the 1930s, and in a number of instances this trade is actively pursued by the film industry itself. This history supports Su Holmes' (2005, 28) assertion that it was largely exhibitors (rather than producers or distributors) that were threatened by television, and shows that there was conflict *within* the film industry about the attempts by exhibitors to prevent producers and distributors from selling their films to television.

Exclusive Films offers a clear example of this more complex picture of the relationship between the film industry and the BBC in the 1930s and the 1940s. Enrique Carreras and Will Hinds set up the distribution company Exclusive Films in 1935, distributing films produced by Hammer Productions (owned by Hinds whose stage name was Will Hammer) as well as gaining the re-issue rights for films from companies such as British Lion and London Films (Hearn and Barnes 2007, 9). In 1937, 1938 and 1939 Exclusive Films approached the BBC to invite them to their trade shows and the BBC went on to buy fictional and factual shorts and features from Exclusive for television broadcast, with Exclusive and the BBC drawing up a standard contract for this trade.^v While Hammer Films had gone into liquidation in the late 1930s, in 1946 Exclusive began film production again, setting up a dedicated production division (Hammer Film Productions) in 1949 (although a number of Exclusive films produced before this carried the Hammer name on their credits).

The fourth film produced by Exclusive in the post-war era was a 1947 film adaptation of the BBC radio serial *Dick Barton Special Agent*, a 15 minute serialised radio thriller broadcast daily in weekdays on the BBC's Light Programme, that began transmission on 7 October 1946. After the success of this film and over the late 1940s Exclusive (and later Hammer Film Productions) pursued a specific policy of adapting BBC radio serials. Out of 17 feature-length films produced by Exclusive/Hammer Film Productions between 1948 and 1950, 10 were adaptations of radio dramas.^{vi} In December 1948 Exclusive Films sent out the following press release drawing specific attention to this strategy:

Dear Mr Exhibitor, As you know millions and millions of people form a mental picture of their radio favourites, such as – Dick Barton, Dr Morelle, PC49, Miss Dangerfield and The Daring Dexters. To ensure you a prosperous 1949, Exclusive will deliver you the following films with Box Office Titles. *Dick Barton Strikes Back*, *Dr Morelle (The Case of the Missing Heiress)*, *The Adventures of PC49 (The Case of the Guardian Angel)*, *The Fabulous Miss Dangerfield*, *The Daring Dexters*, *Dick Barton v. The Death Ray*, and millions will flock to see their favourites on your screens. (reproduced in 'It's Exclusive', *Dark Terrors* 2002, 18)

Clearly, Exclusive felt that radio adaptations would have a particular draw for cinema audiences. Not only was the material pre-sold, but also the cinema could offer the added attraction of visualising characters and stories only previously imagined by viewers.^{vii}

Exclusive's strategy is not surprising given the appeal of radio at this time. Indeed, from the late 1930s the BBC had begun to receive a number of enquiries from film and stage companies interested in acquiring the rights to its radio variety shows. In many instances the corporation had been unable to pursue these requests because copyright could not be

seen to lie with the BBC, but rather with the stars and writers of the programmes. On 11 February 1938 an internal memo from Mr Marr (Programme Copyright) to the Director of Variety suggested that the BBC should buy the copyright outright for programmes where it anticipated opportunities for commercial exploitation, and formalise the payments made to programme producers to be fair both to them and to the corporation (BBC WAC R23/12/1). When the BBC commissioned the variety series *Band Wagon* in 1938 and *It's That Man Again* in 1939, it ensured that it retained copyright for each programme and went on to sell the film and stage rights to both.^{viii}

The BBC adopted the same contractual position when commissioning writers for *Dick Barton Secret Agent*, clearly anticipating the value to the corporation in retaining copyright of the series. This proved to be a prescient move as the BBC was approached about the film rights to *Dick Barton Special Agent* by International Films, George Black Ltd, British National Films, Production Facilities (Films) Ltd and Grand National Pictures, suggesting that for film producers the BBC offered a potentially valuable source of material that could be adapted for cinema. However, these negotiations were not without their problems and it is here that the more acrimonious relationship between the BBC and the film industry reared its head. When the BBC began to be approached concerning the film rights to *Dick Barton*, Norman Collins^{ix} (Controller of the Light Programme) explicitly asked that the rights to televise the film adaptation be included as part of the negotiations (BBC WAC R23/18/1, memo 31 January 1947). This was a significant change for the BBC as television rights had not been included in previous negotiations for the sale of film rights. When William Streeton (Programme Contracts Director) asked Collins to justify this change, Collins responded:

this is one of those occasions where we could legitimately force the production side of films into an open clash with their own distributors as I think that it doesn't really matter two hoots whether we sell the film rights or not and it would be quite unthinkable for Television *not* to be able to show the film if one or other of these companies eventually decided to proceed with the idea (BBC WAC R23/18/1, memo, 5 February 1947)

This position is noted as a matter of programme policy on 15 July 1947 (BBC WAC R23/18/1). This change in BBC policy is revealing about the role of the sale of film rights for the BBC at this time. It suggests that the BBC's policy of retaining copyright to its material was not solely or primarily motivated by profit. Collins is clear that the commercial profits to be made from selling the rights to BBC material are of little significance in these negotiations. For Collins, the value of selling the film rights to *Dick Barton* is that it allows the BBC to force film production companies to challenge film exhibitors who were trying to prevent the sale of films for television transmission.

The BBC's insistence on retaining the rights to televise any film adaptations of *Dick Barton* did not, however, cause the 'open clash' between film producers and exhibitors desired by Collins. Rather, a number of reputable film producers, such as George and Alfred Black, pulled out entirely of negotiations for the film rights to *Dick Barton* precisely because of the BBC's insistence on retaining television rights. However, the BBC did secure a contract with Exclusive Films for no more than four films based on or adapted from the scripts for *Dick Barton Special Agent*, who stated no objection to the televising clause.

Despite insisting on retaining television rights, the BBC was not interested in televising the first *Dick Barton* film produced by Exclusive (*Dick Barton Special Agent*,

released in 1948). Although the film had made reasonable box office takings, the BBC complained that the film deviated from the script that they had approved and that the low quality of the film damaged the radio broadcasts by departing from the traditions established in the radio serial.^x Both John MacMillan (writer for the radio serial) and Neil Tuson (producer of the radio serial) argued that in future the BBC should refuse to sell the rights to its material, or should do so only to major production companies. T. W. Chalmers (as Acting Controller of the Light Programme) stated that the BBC should even consider refusing to allow Exclusive to make the second film based on the quality of the first, and asked how the rights ever came to be sold to 'a firm as little reputable (even in trade circles) as Exclusive.' (BBC WAC R23/18/1, memo 11 March 1948). In fact, after pressure from the BBC, Neil Tuson was enlisted by Exclusive to aid in the shooting of the second film, in a practice that is now common in the sale of formats by major US corporations who often send a 'flying producer' to oversee the production of the format. There is clear concern here that Exclusive's film adaptation of *Dick Barton* could have a negative impact on the reputation of the BBC, and that protecting the aura of quality associated with BBC programming was particularly important in the sale of the film rights. Yet there is also conflict between protecting the rights of the BBC television service to televise film adaptations of BBC material on the one hand, and protecting the integrity of the original programme with high quality adaptations on the other. Chalmers' comments are rather ironic given that the BBC declined to televise the first *Dick Barton* film because of its poor quality while the film rights were sold to Exclusive precisely because more reputable companies pulled out of negotiations after the BBC insisted on retaining television rights to the film adaptation.

However, while the BBC declined to televise the first *Dick Barton* film produced by Exclusive, when the BBC came to request a copy of *Dick Barton Strikes Back* (the third film produced but the second *Barton* film released by Exclusive) for television transmission on 24 December 1949, its contract proved inadequate in overcoming the film industry's attempts to prevent films being transmitted on television. *Dick Barton Strikes Back* was released for cinema exhibition on 18 July 1949. At this time the CEA (Cinematograph Exhibitors Association) were calling upon exhibitors to boycott the products of any film production company that provided films to the BBC to be televised. As a consequence, if Exclusive gave the BBC a copy of *Dick Barton Strikes Back* for television transmission, it might be unable to get any of its other films exhibited across the UK. On top of this, Exclusive had failed to recoup their costs on *Dick Barton Strikes Back* and argued that this was primarily because of the BBC's insistence that they improve the quality of the adaptation after their criticisms of the first film.

Furthermore, the BBC was advised by its solicitors that it had little legal position upon which to force Exclusive to hand over the film. The reason for this was that the clause in the contract between Exclusive and the BBC regarding the television rights for the *Dick Barton* films was drawn up to resemble a provincial film exhibitor and failed to take into account the very different exhibition practices of cinema and television. The contract stated that:

the Corporation shall be entitled from a date to be agreed *but which shall not be later than the general release date of each of the said films through the main circuits of exhibitors in the United Kingdom* to use each of the said films four times for the purposes of the Corporation's Television Service *during a period not exceeding four*

consecutive weeks in respect of each film upon payment by the Corporation of a fee to be agreed between the Corporation and the Producer but to be similar to the sum which would normally be charged by the Producer to and received from a provincial film exhibitor (BBC WAC R22/954/1, 30 September 1947, my italics)

While a provincial cinema would want the assurance that it would be able to show the film while it was on general release and a number of times within a short period, this contract actually prevented the BBC from televising the films after they had been on general release and restricted its ability to repeat each film to a period of four consecutive weeks. It was for the first of these reasons that the BBC's lawyers claimed that they could not legally force Exclusive to hand over *Dick Barton Strikes Back* for television transmission. Yet, the BBC did not want to televise *Dick Barton Strikes Back* when the film was on general release, but rather on Christmas Eve when it would make good family viewing.^{xi}

What were the reasons for the failure of this clause in the contract to take into account the different exhibition practices of television? Certainly, there would have been few precedents at the BBC or within Exclusive for dealing with a 'televising clause' within a rights contract, and so it is perhaps not surprising that they should turn to cinema exhibition as a model. Yet it is clear from the WAC files that the BBC's aim when negotiating with Exclusive was to gain the *same* exhibition rights for the *Dick Barton* films as a cinema exhibitor, rather than to secure the best terms for the television service (BBC WAC, R23/18/1). While Cecil McGivern argued that cinema exhibitors might refuse to show the *Dick Barton* films if the BBC insisted on televising it at the same time as it was screened in cinemas, both M. A. C. Gorman (Head of the Television Service) and Basil Nicholls (Senior Controller) argued that the BBC should insist on having the same transmission dates as any

other cinema exhibitor as a matter of principle. The fact that the BBC placed the principle of being treated the same as other cinema exhibitors over the practicalities of televising the film adaptations suggests that the BBC's primary intention in selling the film rights for *Dick Barton* was not financial gain, or even securing adequate rights to televise the adapted films. Rather, these negotiations can be better understood as part of the BBC's attempt to assert its position in its ongoing dispute with the film industry, to champion BBC television's potential as a site for the exhibition of cinema films, and to assert the BBC's control over films adapted from its own programming.

Although Exclusive went on to adapt 12 more BBC radio programmes for the cinema over the late 1940s and early 1950s, it did not enter into contractual negotiations with the BBC again until 1953 when it approached the BBC about the film rights to its television serial *The Quatermass Experiment*. The bulk of the adaptations from BBC programmes produced by Exclusive in this period were based on plays where the copyright lay with the writer, such as the film *Dr Morelle: The case of the missing heiress* (1949) which was based on a character devised by Ernest Dudley for the BBC radio anthology series *Monday Night at Eight* (1938-48), or the films *Life with the Lyons* (1954) and *The Lyons in Paris* (1954) based on the BBC radio serial *Life with the Lyons* (1950-62) whose copyright resided with its US stars Bebe and Ben Lyons. By contrast, copyright for *The Quatermass Experiment* lay with the BBC. Exclusive approached the BBC to enquire about purchasing the film rights to *The Quatermass Experiment* three days before the final episode of the serial aired in August 1953 (BBC WAC R126/401/1, 19 August 1953). However, the serial's writer Nigel Kneale informed the BBC that he had personally received enquiries from MGM and 20th Century Fox, larger and more reputable companies (BBC WAC R126/399/1, 1 October 1953). By 9

December 1953, the BBC drew up a list of the fourteen companies that it had approached, or that had directly approached the BBC with regard to the film rights for the serial, indicating the corporation's interest in engaging in a trade in rights with film production companies (BBC WAC R126/401/1). Exclusive ended up acquiring the film rights to the serial, in part because the censorship laws in Britain made the serial's horrific subject matter potentially problematic. A number of UK companies, such as Lauder-Gilliat and Group 3, pulled out of negotiations with the BBC after testing the views of the film censors, who expressed potential censorship difficulties in adapting such a 'horrific' production for the cinema (BBC WAC R126/401/1, 14 April 1953).^{xii}

For Exclusive, the potential censorship problems were less of an issue because of a recent deal it had struck with a US distributor Robert Lippert. Between 1948 and 1950 Exclusive distributed 26 of Lippert's films in the UK. A new five-year deal signed in 1950 extended the terms of this arrangement. While Exclusive would continue to distribute Lippert films, Lippert would also distribute Exclusive/Hammer films in the US, and the two companies would co-produce six or seven films per year in the UK (see Hearn and Barnes 2007, 10; Harper and Porter 2003, 141). Exclusive's deal with Lippert was designed to exploit the Anglo-American agreement signed in 1950 that encouraged US investment in British film production (Harper and Porter 2003, 5-6; Hearn and Barnes 2007, 10-11). One consequence of this deal was that Hammer turned away from its strategy of adapting BBC material, shelving plans for film adaptations of *The Fabulous Miss Dangerfield*, *The Daring Dexters*, and *Mrs Dale's Diary* as it was felt that they were not suitable for the US market. While over half of its productions between 1948 and 1950 were adaptations of radio serials, between 1951 and 1954 only 5 of its 30 productions (or 6 out of the 28 films released) were

adapted from the BBC, although it did produce a significant number of adaptations of novels and plays, and so still favoured pre-sold material. Clearly, however, Exclusive felt that *The Quatermass Experiment*, with its tales of alien invasion and space adventure (which included an international crew of astronauts in the original television production) would play well in the US. But as a further consequence, Exclusive was less concerned about the potential impact of censorship on the UK market and even went on to use the new X certificate as part of their marketing for the film, re-titling it (in the UK) *The Quatermass Xperiment*.^{xiii}

Once again, however, the BBC's primary concern in negotiating the film rights for *The Quatermass Experiment* was with retaining the rights to transmit the final film adaptation on television. However, this was not simply a matter of gaining leverage in an on-going fight with film exhibitors, as with *Dick Barton*. In addition, the BBC was particularly concerned that the film adaptation of *The Quatermass Experiment* should not be offered to other television stations without the BBC's permission. As such, the BBC was anticipating the impact of competition in advance of the arrival of ITV in September 1955, and was keen to prevent BBC-adapted material being transmitted on ITV. Yet, despite the problems experienced by the BBC in attempting to televise *Dick Barton Strikes Back*, the contract's clause detailing the BBC's rights to televise the film of *The Quatermass Experiment* was almost identical to that for the *Dick Barton* serials:

the Corporation shall be entitled from a date to be agreed but which shall not be later than the general release date of the said film through the main circuits of exhibitors in the United Kingdom to use (if it so desires) the said film three times for the purposes of the Corporation's Television Service during a period not exceeding three consecutive weeks upon payment by the Corporation of a fee to be agreed

between the Corporation and the Producer but to be similar to the sum which would normally be charged by the Producer to and received from a provincial film exhibitor at that time in respect of any one similar film which is the product of the Producer.

(BBC WAC R63/55, 9 August 1954)

Furthermore the contract also waived the BBC's rights to remake or film the serial themselves, or to exploit the television rights to the serial, so that when television production companies from Belgium, Latin America and Canada approached the BBC about buying the rights to adapt *The Quatermass Experiment* for television, the BBC were unable to capitalize on the potential financial rewards of such sales. However, the BBC were satisfied with Exclusive's adaptation of the series with Michael Barry (Head of Television Drama), in a memo dated 4 October 1955, stating that 'I think it fair to say that we were satisfied with their handling of *The Quatermass Experiment* and that its presentation as a major film has done the BBC Television Service quite a lot of good' (BBC WAC R126/401/1).

Barry's quotation points to a particular way of interpreting the details of the BBC's negotiations with Exclusive for the film rights to *Dick Barton* and *The Quatermass Experiment*. The various clauses in both contracts, in which the BBC failed to secure adequate contractual rights for televising the films, and (in the case of *The Quatermass Experiment*) signed away the rights to sell the programme for adaptation for television overseas, suggest that while the BBC may have actively pursued the sale of film rights for each serial, when it came to negotiating the terms of this trade, financial gain was secondary to the protection and maintenance of the BBC's reputation. Steve Jones notes that intellectual property intertwines the two etymological roots of the word 'property': 'derived from the Latin *proprius*, meaning "one's own", the word property was a doublet for

propriety in More's Utopia.' (Jones, cited in Coombe and Herman 2001, 923). Intellectual property, in allowing the owner to protect the uses of his/her property, combines the notion of ownership with the notion of propriety or correct behavior. It implies that the improper use of a sign or property might damage the property and its owner. This double meaning is at work in the BBC's negotiations with Exclusive. It would have been damaging to the BBC's reputation (its propriety) for it to sell the film rights to its own material if it was then denied the rights to televise the subsequent films. It would weaken the BBC's negotiating position if it was seen to place the sale of the film rights over the proprietary rights of the television service to televise films. The fact that the BBC did not televise *The Quatermass Xperiment* until 20 June 1980 suggests that their insistence on a televising clause in their contract with Exclusive was primarily motivated by a desire to prevent the film being televised by ITV, rather than with a desire to televise the film itself. Furthermore, in the concern expressed about the quality of Exclusive's film adaptations is the implication that any improper exploitation of BBC material (in this instance a film that does not meet the criteria of quality central to the BBC's reputation) could damage the BBC's public image.

Commercial exploitation and the protection of the BBC's corporate identity

The BBC's attempts to protect its reputation extended beyond the negotiation of film rights to its material, to its handling of the non-film rights for the *Dick Barton* serial. This tested the limits of the BBC's ability to protect fully the exploitation of its own material, and by association its own public image. Even before the *Dick Barton* serial aired for the first time, the BBC began receiving requests concerning the exploitation of the serial in non-broadcast form. These requests came from areas as diverse as newspapers and advertising agencies with regard to book and comic strip rights, to toy manufacturers, charities and

even local community groups regarding merchandise and ephemera. In general, the BBC was not interested in selling these rights to the *Dick Barton* serials because it was keen to maintain its reputation and to protect the perceived quality of *Dick Barton* as a radio serial. As the BBC's standard rejection letter to enquiries about the rights to *Dick Barton* stated, 'an over-emphasis might affect the long term popularity of this broadcast programme' (BBC WAC R23/14/1, 28 April 1947). And again, financial gain was not a primary motivation: as William Streeton stated in a memo regarding the rights for *Dick Barton*, 'we are not broke at the moment' (BBC WAC R23/14/1, 30 September 1946).

This fear of 'over-emphasis' applied in particular to what the BBC termed 'tangible' rights, such as for toys and other consumer products. Hence, while the BBC did eventually sell the rights to film, book, stage and strip cartoon adaptations of *Dick Barton*, it consistently turned down all requests for rights to *Dick Barton* ephemera and merchandise. This included even turning down requests from charities and community groups that wanted to use the *Dick Barton* name or characters, on the basis that the BBC must be equitable in its treatment of all requests. However, despite this, the BBC was made aware (usually by disgruntled companies whose requests to produce *Dick Barton* products had been refused) of a number of products on the market that made use of the *Dick Barton* name. For example, on 23 April 1948, the BBC contacted their solicitors regarding a book published by the Alderton Press entitled *The Dick Barton Log Book*, stating that this appeared to be an infringement of copyright. The reply from the BBC's solicitor indicated the problems for the BBC's legal position at this time:

we do not consider that this constitutes any infringement of our copyright. There is, of course, no copyright in a title and the Log Book, as far as we know, contains no

material taken from any scripts in the Dick Barton – Special Agent broadcast programmes. You will also observe that the authors of this Log Book refer in one instance to “Dick Barton – the BBC’s celebrated Special Agent” and there are two other references to the BBC on another page. In view of these references it would not be possible to suggest that they were trying to pass off the well-known broadcast character of Dick Barton as their own. (BBC WAC R23/14/2, 29 April 1948)

The BBC owned the copyright to *Dick Barton* but this only related to the original scripts. Indeed, in a submission to the Beveridge Committee a year later, the BBC specifically drew attention to the inadequacy of the copyright laws for broadcasting. It demanded that the same protection afforded to the manufacturers of gramophones and cinematographic films be extended to broadcasting so that the BBC could copyright its broadcasts as well as its scripts (BBC Memorandum: ‘A Copyright in Broadcasting’ June 1949, BBC WAC BBC/3). Yet even if the BBC had owned the copyright to the broadcasts of *Dick Barton* it would still not have been able to legally prevent the use of the *Dick Barton* name in this manner. Titles and names generally do not have copyright protection.

The BBC might have been legally protected (as the letter from the BBC’s solicitors stated) if it could have proved that there was an attempt at ‘passing off’ in the *Log Book*. “‘Passing off’ prevents one trader from misrepresenting his goods as the goods of, or associated with, another trader who has an established reputation likely to be harmed’ (Robertson and Nicol 2002, 335). However, passing off only stands if there is danger of confusion in the minds of the public, and this takes two forms: there has to be a common field of activity and a common consumer base. For example, in 1951 *The Eagle* magazine successfully prevented a holiday camp from using the name ‘White Eagle Youth Holiday

Camp’ because a youth holiday camp and the comic *The Eagle* shared a consumer base and operated within a similar field of activity (Flint, Fitzpatrick and Thorne 2006, 73). By contrast, in 1975 the owners of the copyright in the Wombles books failed to prevent a skip company from using the name ‘Wombles Skips’, despite the fact that the owners of the copyright in the Wombles books had licensed the name ‘Wombles’ to be used on a range of different goods. Although the Wombles characters and the Wombles Skips were both related to rubbish collection, the consumer base and field of activity for Wombles products (children’s books and toys) was considered significantly different to prevent confusion in the minds of the public (ibid. 548). After all, children were unlikely to want or need to hire a skip.^{xiv}

To copyright a name, title or character, it must exist as an artistic work; for example if the name is designed with ‘such distinctive lettering that the design of the name is itself an artistic work’ (ibid. 549-50). Registration of a name, title or character as a trademark gives stronger protection, but the author has to establish ‘the reputation, distinctiveness and originality’ of the trademark in order to have it registered (Robertson and Nicol 2002, 336). The *Star Wars* logo is a good example of a title which has distinctive lettering, so that the design can be protected as an artistic work which is also trademarked. Character names can be protected by trademark registration, but only when the name’s distinctiveness can be proved.^{xv} Both of these strategies are common to contemporary television production, particularly in the US. For example, the creators of *Buffy the Vampire Slayer* (WB 1997-2001, UPN 2001-03) designed a font for the title of the series that could be protected as an artistic work, as well as registering the name of the series (which is also the name of the lead character) as a trademark. Both the *Star Wars* and *Buffy the Vampire Slayer* names and

logos can then be licensed to appear on a range of consumer products, from games to chocolate bars.

For the BBC, operating in the late 1940s in the area of broadcasting, the position was much more difficult. As Gaines argues, ‘there is a built-in incompatibility between “sound” and property rights’ (1991, 106), because sound is generally seen as property-less and disembodied. While she is referring specifically to voice artists and sound-alikes, clearly her arguments have some relevance to radio broadcasts at this time. The BBC created *Dick Barton* for radio and so the character did not exist as an image or even as a logo or visual graphic. In this sense, the *Dick Barton* name (unlike the scripts) was ephemeral and unfixed – it did not exist as property to which the BBC could claim ownership. When the BBC was faced with others fixing the *Dick Barton* name to other products (such as a log book or a toy set) the BBC had little legal position from which to prevent them. Yet, despite its lack of legal protection the BBC wrote to companies who were using the *Dick Barton* name asking them to withdraw their products, and there is some evidence that they complied (BBC WAC R23/14/2). The tactic of corporations sending what are now generally referred to as ‘cease and desist’ letters to individuals and companies using their marks without agreement, even when the legal basis for such action is weak, has become relatively commonplace, particularly since the emergence of the Internet.^{xvi} In the late 1990s and early 2000s there were a number of high-profile instances of fan websites being threatened with legal action by large media conglomerates (see Coombe and Herman, 2001 and Jenkins, 2006). Fox threatened a number of sites such as www.vidiot.com which posted links where fans could download promotional video and audio clips, opening and closing credits, frame grabs and theme tunes for popular shows, including a number of Fox shows, claiming that these sites

violated Fox's copyright and trademark rights in these programmes. In a similar vein, Warner Bros. wrote to a number of *Harry Potter* sites after it purchased the film rights to the book series in 2001 threatening to shut down sites that infringed their copyright and trademark rights, even though many of these sites were run by teenagers as an expression of their fandom for the franchise. In these cases, the companies were using trademark and copyright law to control the meanings associated with their products and the uses that they were put to. There are two main reasons for this. First, to financially protect their investment, so that they can justify the fees that they charge other companies for licensing such activity, and second to ensure consistent meanings associated with the programme and to prevent any dilution of the value and distinctiveness of their marks. Yet such activities have also led to widespread criticism of, and negative publicity for, such media conglomerates for constraining the creative activities of the very viewers and consumers that contributed to the franchises' success and who are operating not for profit but for pleasure (see Coombe and Herman, 2001, who argue that the Internet actually facilitates such critical discourse).

While the BBC was engaged in similar activities to Fox and WB in attempting to prevent anyone (whether a commercial corporation, a charity or a local community) from using the name *Dick Barton* regardless of their legal right to do so, their reasons for this action were to some extent different. As I have argued the BBC was not motivated primarily by profit, and was not preventing use because they intended to make money from licensing the name elsewhere for these uses. However, the BBC was concerned about the dilution of the distinctiveness of the *Dick Barton* name. For example, the BBC initially rejected requests for book rights to the serial because Norman Collins felt that a book publication would not

be favourable publicity for the BBC as it was likely to be too lurid (BBC WAC R23/14/1, memo 18 Dec 1946). Meanwhile rights for a strip cartoon were not sold until the radio serial was off-air to prevent the stories in the cartoon interfering with the stories being told on the radio (ibid. 11 April 1947). For today's corporations, preventing the dilution of trademarks is essential in order to ensure that the trademark retains the distinctiveness necessary to be protected by law (see Coombe, 1998). For the BBC, preventing dilution of the meanings associated with the *Dick Barton* name functioned to protect the integrity of the original programme. As such the films and other products adapted from the BBC's programmes were viewed as a form of 'publicity' that would weigh positively or negatively on the programme itself.

Yet, as the negotiations around the quality of the *Dick Barton* and *The Quatermass Experiment* films attest, such publicity was seen to impact not only on the original programmes, but also on the public image of the BBC as a corporation. While the BBC was a publicly-funded corporation with a monopoly on broadcasting it was operating within a larger industrial context in which it was forced to engage with commercial practices through its dealings with businesses in related areas, such as newspapers, book publishers, toy manufacturers and film producers/distributors. The BBC was prompted to write 'cease and desist' letters to commercial companies producing and selling *Dick Barton* products after it received complaints from companies whose requests to produce similar merchandise had previously been turned down. These disgruntled letters complained that the BBC had been dishonest in its commercial dealings. The unlicensed merchandise weighed negatively on the BBC's reputation in three ways. First, the BBC was seen to be commercially exploiting its programming which was funded by public money and produced as part of a public service.

Second, the BBC was seen to be untrustworthy in its dealings with businesses. Third, the BBC was seen to be endorsing products related to its programmes whose quality may be questionable. Centrally, then, the exploitation of BBC material (whether endorsed or not by the BBC) had an impact on the BBC's image as a public service broadcaster. Yet paradoxically, in attempting to police the uses and meanings associated with its programmes the BBC actually constrained the ways in which the general public (who paid for the programming through the license fee) could productively and creatively engage with its programming in a manner not dissimilar to contemporary media conglomerates.

In the immediate post-war period, the BBC may have been a publicly-funded broadcaster with a monopoly on broadcasting, but it was as keen to protect its products and its corporate image as any large commercial conglomerate. The perceived need to uphold and protect a corporate identity, therefore, cannot be seen as exclusive to corporations competing financially with others to provide the same service. Furthermore, although the BBC was a publicly funded corporation with a public service remit, this did not preclude the corporation from engaging in the commercial sale of the rights to its programmes to third parties. However, the BBC's attempts to manage and protect its intellectual property rights in this period also suggest that we need to be circumspect about understanding the trade in rights and the role of intellectual property rights in the media as being purely driven by and used for financial gain. While the BBC's decision in the late-1930s to retain copyright of certain programmes likely to be adapted for film and stage points to the corporation's desire to exploit financially its programming material, this came into conflict with a broader distrust (or disdain) within the BBC of commercialisation. Yet, despite this distrust of commercial exploitation the BBC did not abandon the sale of rights to its material. Rather

this trade was framed within a set of negotiations about the BBC's propriety; whether that was protecting the television service's right to televise films adapted from BBC material, the integrity and quality of the original broadcast, or the BBC's integrity in dealing with commercial companies. Ultimately, then what was at stake for the BBC in the trade of its rights for *Dick Barton* and *The Quatermass Experiment* was not primarily financial profit, but something much more important – its reputation.

Acknowledgements:

Thanks to the staff at the BBC Written Archive Centre for helping me to begin to piece together the story of the BBC's trade in rights, to Kathleen Luckey at the BFI for assisting me in finding production data and to the members of the Southern Broadcasting History Group for their useful comments on this work. In particular, thanks to John Ellis for suggesting that I look at *It's That Man Again*, and to Su Holmes and Rob Turnock for taking the time to read drafts of this article and providing invaluable insights in their comments.

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ⁱ See also Steemers (2004, 23-4) who examines the dominance of the trade in television in the 1950s and 1960s by commercial broadcasters from the US (who also adopted film for television production earlier than the UK), and the various historical accounts of the success in exports of the British commercial franchise ATV (Associated Television) and its production company ITC (Incorporated Television Company), such as Neale (2005), Johnson (2005) and Chapman (2002).

ⁱⁱ According to Briggs the trade in television programming was hampered by internal conflicts within the BBC about the impact of gearing programme production to the demands of foreign (specifically US) broadcasters, fears of the BBC engaging in private enterprise and hostility from some in the Government (1979, 980-1).

ⁱⁱⁱ See for example Coombe (1998), Vaidhyathan (2001) and Gurnsey (1995).

^{iv} Su Holmes's (2005) history of the cinema programme also demonstrates a more symbiotic relationship between the film and television industries in the UK. She argues that the cinema programme on television (television programmes which discussed films and film culture) offered the film industry valuable promotion and demonstrated the BBC's interest in popular culture.

^v This contract was in use until 1939 when the BBC suspended the television service at the outbreak of the Second World War. When the television service resumed in 1946, this trade continued (BBC WAC T6/135/2).

^{vi} This is based on the production data provided by the journal, *The House that Hammer Built* (no.1, 1997). According to the British Film Institute's catalogue, Hammer/Exclusive released 13 films between 1948 and 1950, of which 10 were based on radio dramas.

^{vii} Although radio actors were often well known through fan magazines and public appearances (see Holmes, 2008), Exclusive clearly felt that the films would add an attractive new dimension by bringing the characters to life on the big screen.

^{viii} Despite the BBC's attempts to retain full copyright for *The Band Wagon* and *It's That Man Again*, in both instances there was some material not owned by the BBC, largely because it had been written before the BBC's new contract, and/or been used by the variety performer elsewhere. The rights for these sketches and songs had to be negotiated separately between the writer/performer and the film or stage production company. Meanwhile, negotiations for the ex gratia fees to be paid by the BBC to the producers and writers of both programmes proved complex and often antagonistic, particularly because the BBC was seen to be intervening in what would previously have been private negotiations for rights between the authors and the film/stage production company (see for example, BBC WAC R23/12/1).

^{ix} According to Briggs (1979) Norman Collins was Controller of the Light Programme from November 1945 to November 1947 when he moved to become Controller of Television. T. W. Chalmers replaced him officially as Controller of the Light Programme in October 1948, but acted in the role before then.

^x The BBC's complaints were set out in a letter to Exclusive on 17 March 1948 (BBC WAC R23/18/1). A clause giving the BBC the right to approve scripts before production seems to have been relatively standard and appeared in the contracts for the film and stage adaptations of *Band Wagon* and *It's That Man Again*.

^{xi} This dispute was not resolved for another 12 months, when Exclusive finally released *Dick Barton Strikes Back* to the BBC for television broadcast.

^{xii} There is no indication in the BBC WAC files that the BBC entered into serious negotiations with the Hollywood studios MGM and 20th Century Fox.

^{xiii} When the film rights for *The Quatermass Experiment* were negotiated Exclusive's deal with Lippert was still in place. However, it had ended by the time the film was released and the film version of *The Quatermass Experiment* (entitled *The Creeping Unknown* in the US) was actually distributed by United Artists (Harper and Porter 2003, 144).

^{xiv} See Coombe for a detailed discussion of the problems with intellectual property law and in particular trademark law which is 'premised upon legal fictions of public meaning and consumer confusion' (1998, 9).

^{xv} In the period from 1945-55 the BBC would have been operating under the British Trade Marks Act of 1938 which was substantially revised in 1994, giving greater power and protection to the trademark owner (see Lury 2004, 98-128). Coombe points out that while the Trade Marks Act of 1938 saw the trafficking in trademarks as against the public interest, the practice of character merchandising (which is essentially a traffic in trademarks) undermines this and points to the ways in which commercial practice historically exceeded the intentions of Parliamentary legislation in the UK (1998, 64).

^{xvi} Coombe and Herman argue that such policing against potential infringements is necessary since trademark protection can only be claimed if the mark retains its distinctiveness (2001, 932-3).